1 EDMUND G. BROWN JR.
   Attorney General of the State of California
2 DANE R. GILLETTE
   Chief Assistant Attorney General
3 JULIE L. GARLAND
   Senior Assistant Attorney General
4 HEATHER BUSHMAN
   Supervising Deputy Attorney General
5 LORA FOX MARTIN, State Bar No. 168012
   Deputy Attorney General
6 110 West A Street, Suite 1100
   San Diego, CA 92101
7 P.O. Box 85266
   San Diego, CA 92186-5266
8 Telephone: (619) 645-2019
   Fax: (619) 645-2581
9 E-mail: Lora.Martin@doj.ca.gov

10 Attorneys for Respondent

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                    IN THE UNITED STATES DISTRICT COURT
12
                 FOR THE SOUTHERN DISTRICT OF CALIFORNIA
13

14

15 **JUAN PORTILLO,**   CV 08-0706-LAB (JMA)

16   Petitioner,   **RESPONDENT'S REQUEST FOR
                                                 STAY PENDING ISSUANCE OF**
17   **v.**   **THE MANDATE IN** *HAYWARD*

18 **VICTOR ALAMGER, WARDEN, et al.,**

19   Respondents.   The Honorable Jan M. Adler
                                                 U.S. Magistrate Judge

20
                              INTRODUCTION
21
        Petitioner filed a Petition for Writ of Habeas Corpus, contending that his due process rights
22
   were violated by the Board of Parole Hearings' 2006 decision finding him unsuitable for parole.
23
   The Court ordered a response to the Petition. A Motion to Dismiss the Petition is due on or
24
   before July 7, 2008, and any Answer is due on or before August 7, 2008. On May 16, 2008, the
25
   Ninth Circuit granted en banc review in *Hayward v. Marshall*, 512 F.3d 536 (9th Cir. 2008),
26
   reh'g en banc granted, __ F.3d __, No. 06-55392 (9th Cir. filed May 16, 2008), and argument
27
   was heard in that matter on June 24, 2008. The en banc court in *Hayward* may decide whether
28
   this Court has jurisdiction over this case, and the appropriate standard to be applied if there is

   Respondent's Request For Stay Pending Issuance of The Mandate in *Hayward*   **CV 08-0706-LAB (JMA)**

1 jurisdiction. Therefore, Respondent requests a stay of this case pending the issuance of the

2 mandate in *Hayward*.

<div align="center">

ARGUMENT

I.

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5 **THE COURT SHOULD EXERCISE ITS DISCRETION AND STAY THIS MATTER PENDING ISSUANCE OF THE MANDATE IN *HAYWARD***

6 **BECAUSE BOTH THE BALANCE OF THE INTERESTS AND CONSIDERATIONS OF JUDICIAL ORDER AND ECONOMY FAVOR**

7 **GRANTING A STAY.**

8 A trial court has discretion to ensure the just and efficient determination of a case by

9 staying it pending the resolution of other proceedings where a stay would be "efficient for [the

10 court's] docket and the fairest course for the parties." *Leyva v. Certified Grocers of Cal.*,

11 593 F.2d 857, 863 (9th Cir. 1979). In determining whether to grant a stay, a court should

12 consider the possible damage that may result, the hardship or inequity that a party may suffer,

13 and the orderly course of justice, in terms of simplifying or complicating the issues, proof, and

14 questions of law, that could result from the issuance of a stay. *Lockyer v. Mirant Corp.*, 398 F.3d

15 1098, 1109, 1111 (9th Cir. 2005). A court should also take into account the existence of similar

16 cases that are pending in the same district court, and the probability that more are likely to be

17 filed. *Id.* Staying cases that are on the forefront of an issue provides a necessary delay, allowing

18 for resolution of the issues and resulting in uniform treatment of like suits. *Id.*

19 As the resolution of *Hayward* could significantly impact this case and numerous similar

20 cases and issuing a stay would prevent unfairness and serve the interests of judicial economy, the

21 Court should therefore exercise its discretion and stay this matter pending the issuance of the

22 mandate in *Hayward*.

23 **A.   Moving Forward with this Case Before the Finality of *Hayward* Does Not Serve the Interest of Judicial Economy.**

24

25 Granting a stay in this case serves the interests of judicial order and economy. On May

26 16, 2008, the Ninth Circuit granted rehearing en banc in *Hayward*. (Ex. 1.) At issue before the

27 en banc panel in *Hayward* are two threshold issues which are necessary to the resolution of this

28 case: 1) whether California has created a federally protected liberty interest in parole for life

1 | inmates, and 2) if a liberty interest is created, what process is due under clearly established

2 | Supreme Court authority. Resolution of these issues could establish that Petitioner does not have

3 | a federally protected liberty interest in parole, potentially allowing the Court to dismiss his

4 | claims for lack of jurisdiction without requiring briefing from the parties. Moreover, it would be

5 | wasteful to proceed in this case without the Ninth Circuit's holdings in these matters, as the

6 | parties would need to brief issues that will be decided en banc and then submit supplemental

7 | briefing to apply the law as clarified in the en banc decision. The two rounds of pleadings may

8 | unnecessarily complicate the matters raised and would impair the orderly course of justice.

9 | Waiting for the resolution of *Hayward* would thus conserve Court resources, and prevent the

10 | Court from having to revisit this matter if *Hayward* is modified or reversed.

11 | A stay would also serve judicial order and economy by maintaining uniform treatment of

12 | like suits, as once the law is settled it can be uniformly applied. In many habeas petitions

13 | challenging California parole decisions, the Ninth Circuit has sua sponte stayed submission of

14 | the cases until the resolution of *Hayward. See, e.g., Tolliver v. Carey*, no. 07-15347; *Boatman v.*

15 | *Brown*, no. 05-16199; *Smiley v. Hernandez*, no. 06-55727; *Valdivia v. Brown*, no. 08-15650;

16 | *Johnson v. Newland*, no. 04-16712; *Varner v. Brown*, no. 05-16029; *Johnson v. Finn*, no. 06-

17 | 17042; *Clark v. Shepherd*, no. 06-55065; *Cooke v. Solis*, no. 06-15444.

18 | Granting a stay would therefore conserve judicial resources and serve the Court's interest

19 | in orderly managing these proceedings.

20 | **B.   A Stay Would Not Unfairly Delay Petitioner in Pursuing His Claims.**

21 | A stay of this case at the district level would not unfairly impose any additional or

22 | otherwise avoidable hardship on Petitioner. As discussed above, if the parties proceed in this

23 | case additional briefing will likely be needed after the decision in *Hayward*, perhaps delaying

24 | final resolution. Also, even if this court decides this case before *Hayward*, it is likely the losing

25 | party will file an appeal, and that appeal may be delayed pending resolution of *Hayward. (See*

26 | Arg. I.A.)

27 | ///

28 | ///

Respondent's Request For Stay Pending Issuance of The Mandate in *Hayward*

3

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CONCLUSION

When the equities are balanced, the parties' interests and the interests of judicial economy support staying this case pending the final resolution of *Hayward*. Staying this case until challenges to *Hayward* are resolved and that decision becomes final promotes the orderly resolution of this matter, and will assist in maintaining uniformity of like suits pending before this Court and similar cases that will be filed in the future. Respondent therefore requests that the Court exercise its discretion to stay this matter pending issuance of the mandate in *Hayward*.

Dated: July 7, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

JULIE L. GARLAND
Senior Assistant Attorney General

HEATHER BUSHMAN
Supervising Deputy Attorney General

s/ Lora Fox Martin

LORA FOX MARTIN
Deputy Attorney General
Attorneys for Respondent

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Respondent's Request For Stay Pending Issuance of The Mandate in *Hayward*   CV 08-0706-LAB (JMA)

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Portillo v. Almager**

Case No.:   **CV 08-0706 LAB (JMA)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On <u>July 7, 2008</u>, I served the attached **RESPONDENT'S REQUEST FOR STAY PENDING ISSUANCE OF THE MANDATE IN *HAYWARD*** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Juan A. Portillo
CDC # H-80425
Centinela State Prison
P.O. Box 931
Imperial, CA 92251-0931

In Pro Per

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 7, 2008, at San Diego, California.

B. Magallanes
_____   _____
           Declarant   Signature

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